

DO STATE ANTI-CRUELTY LAWS APPLY TO ANIMALS USED IN SCIENTIFIC RESEARCH?

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THE FEDERAL ANIMAL WELFARE ACT DOES NOT PRE-EMPT STATE CRIMINAL LAWS CONCERNING CRUELTY TO ANIMALS

Most institutions that engage in experiments on animals in connection with scientific research are subject to the federal Animal Welfare Act (AWA) and the regulations concerning required care of such animals promulgated by the United States Department of Agriculture to implement the AWA. The AWA applies to such an institution if it either purchases or transports live animals covered by the AWA or receives federal funding. 7 U.S.C. § 2132(2). Congress employed its power to regulate interstate commerce in enacting the AWA and could have used that power to pre-empt the application of state anti-cruelty laws to research governed by the federal act. Instead, Congress specifically provided there should be no such pre-emption and expressly invited the states to regulate use of animals in such research.

The AWA states that the U.S. Department of Agriculture "shall promulgate standards to govern the humane handling, care, treatment and transportation of animals by . . . research facilities . . ." 7 U.S.C. § 2143(a)(1). But subsection (a)(8) states that the quoted grant of power to the U.S. Secretary of Agriculture "shall not prohibit any State (or a political subdivision of such State) from promulgating standards in addition to those standards promulgated by the Secretary . . ." A state's general anti-cruelty law should qualify as a "standard" the state has "promulgated" to regulate use of animals at research facilities. See the passage of the AWA quoted in the next paragraph.

The AWA also states that "[t]he Secretary is authorized to cooperate with officials of the various States or political subdivisions thereof in carrying out the purposes of this chapter and of any State, local or municipal legislation or ordinances on the same subject."

Not surprisingly, courts have held these provisions of the AWA preclude a holding that pre-emption of state law can be implied from the terms of the Act. In a case not involving animals used in research, the Court of Appeals for the Seventh Circuit declared that the AWA is not "a pervasive scheme of federal regulation The statute does not contemplate express preemption and none can be inferred." *DeHart v. Town of Austin*, 39 F.3d 718, 722 (7th Cir. 1994) (zoning ordinance can exclude from city AWA-registered dealer in exotic animals)

Despite the federal invitation to states to join in regulating use of animals in scientific research, 35 states, as well as the District of Columbia, have enacted exemption statutes (or included exemption provisions in the statute that lays out the crime of animal cruelty) that at least purport on their face to bar conviction of researchers who could be charged with violating the anti-cruelty law.

The exemption provisions almost always also grant exempt status to other actors such as veterinarians, performers in rodeos, ranchers, etc. The exemption provisions dealing specifically

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with scientific research involving animals fall into two groups: (1) those that exempt only research or facilities governed by the federal AWA and (2) those that include some research or laboratories not subject to the federal AWA.

One appellate court judicially created an exemption applicable to animal research subject to the AWA despite not one but of legislative history to support the idea that the legislature intended to reject the AWA's invitation to join with the federal government in overseeing such activities. In *Taub v. State*, 463 A.2d 819 (Md. 1983), Maryland's highest court reversed the conviction of a researcher for violating the state's animal cruelty statute based on his failure to provide needed veterinary care to a monkey, stating:

[T]he involved laboratory was subject to detailed regulations of the Secretary of Agriculture . . . which set forth specifications for humane handling, care [and] treatment Accordingly, we do not believe the legislature intended [the animal cruelty statute] to apply to this type of research activity under a federal program.

Id. At 821.

This untenable holding ceased to have effect in 2001 when the Maryland legislature specifically exempted from the scope of the state's animal cruelty statute "research conducted in accordance with protocols approved by an animal care and use committee, as required under the federal Animal Welfare Act or the federal Health Research Act." 2001 Md. Laws 3128, amending Md. Code, Crim. Law, § 10-603.

We shall see that many of the exemptions – such as those that limit exempt status to "bona fide" or "properly conducted" experiments – are of no benefit to researchers who are potential defendants under the anti-cruelty laws, because experiments meeting those standards would not be violations even in the absence of the exemptions.

CONSTRUCTION OF STATE ANTI-CRUELTY STATUTES AS APPLIED TO USE OF ANIMALS IN SCIENTIFIC RESEARCH IN THE ABSENCE OF AN EXEMPTION

There is apparently but one reported case involving a prosecution for violation of a state anti-cruelty statute based on an use of animals in a scientific experiment, *New Jersey S.P.C.A. v. Board of Education*, 219 A.2d 200 (N.J. Super. 1966), *aff'd per curiam*, 227 A.2d 506 (N.J. 1967). The School Board was prosecuted for permitting a high school student to conduct an experiment in which he injected chickens with a cancer virus, causing tumors to develop that caused pain to the chickens and which lead to the death of two chickens. The charge was that the defendant had as a result caused the violation of the anti-cruelty statute directed at one who "[n]eedlessly mutilates . . . a living animal [or] . . . [a] person who shall inflict unnecessary cruelty upon a living animal." N.J.Stat. § 4:22-26(a) and (c). The exemption statute covered only "properly conducted experiments" that had

been authorized by the state department of health, which had issued only 26 such authorizations, none to any high schools.

The court rejected the prosecution's argument that because the defendant had failed to apply to the state board for authorization, it was barred from defending the case on the theory the prosecution failed to prove the experiment was "unnecessary." The court construed the exemption as allowing institutions that did obtain authorization from the state board of health to engage in experiments in which researchers did inflict "even unnecessary pain or even needlessly mutilate or kill a living animal in the course of their work without being liable to prosecution." 219 A.2d at 205. This apparently was dictum and seems to ignore that the authorized experiment has to be "properly conducted" for the exemption to apply. Arguably an experiment is improperly conducted if the researcher chooses to engage in "needless mutilation." On the other hand, if "needless" means no more than "unjustifiable," the dictum may be correct.

In discussing whether the experiment was "unnecessary" under the language describing the crime allegedly committed, the New Jersey court did equate lack of necessity to lack of justification:

[T]he specific prohibited conduct set out in section 26 as well as the other sections in the statute indicate a common characteristic – that the acts be wanton and cruel and have no redeeming qualities. . . . [The prohibited c]ruelty, to my mind, is the unjustifiable infliction of pain, with the act having some malevolent or mischievous motive. . . . If there is truly a useful motive, a real and valid purpose, there can, under the statutes, be acts done to animals which are ostensibly cruel or which ostensibly cause pain.

219 A.2d at 206.

With "necessary" converted into "unjustifiable," prosecution evidence that the same experiment had been done thousands of times with the same result would be irrelevant, because it is justifiable that the particular high school student learn how animal experiments are done. One can predict that the reasoning of the New Jersey court would be employed in the more numerous states where the wrongful conduct is not described in the statute is needless or unnecessary but, as is more common, unjustified or unjustifiable. E.g., N.C. Gen. Stat. § 14-360(c) ("permitting unjustifiable pain, suffering, or death). If this is the applicable law in the absence of a research exemption, it is difficult to imagine what concerns lead the legislatures in 36 jurisdictions to enact such exemptions.

SOME OF THE EXEMPTIONS SEEM TO OFFER NO BENEFIT TO RESEARCHERS AND POSSIBLY COULD BE INTERPRETED AS HARMFUL TO RESEARCHERS

Like that of New Jersey, the research exemptions of California, the District of Columbia, New York and South Dakota are limited to "properly conducted scientific experiments." In Kansas,

Kentucky, Missouri, Tennessee,² Texas and Utah the exemption is restricted to “bona fide” experiments or scientific tests. (See the quoted exemption provisions in the State by State Survey, *infra*.) Would not any properly performed or bona fide experiment be justifiable?

The “properly conducted” and “bona fide” experiment exemptions are not grammatically tied to the portion of the anti-cruelty statutes they apply to that set forth the elements of the crime but are separately stated. As a result, courts will construe them as statements of affirmative defenses. See *People v. Whaley*, 159 P.3d 757, 759 (Colo. App. 2007) (exemption “found in a separate clause”).

As a result, the prosecution need not present any evidence on the issue in its case in chief, because the defendant has the burden of going forward with the evidence on the issue and presenting a *prima facie* case of applicability of the exemption, at which point the prosecution must rebut that evidence beyond a reasonable doubt. See *Whaley*, *supra*; *Burchett v. State*, 641 S.E.2d 262, 264 (Ga. App. 2007); *People v. Williams*, 328 N.E.2d 192, 195 (Ill. App. 1975); *commonwealth v. Bachman*, 673 N.E.2d 90, 82 n. 5 (Mass. App. 1996).

If “bona fide” and “properly conducted” experiment means the same thing as “justifiable” experiment, it is possible the courts could rule that enactment of the exemptions has freed the prosecution from putting in evidence in its case in chief proof of lack of justification, thereby making the trial longer and a bit more difficult to try, especially where evidence of justification exists but is not overwhelming. As a result, the defendant may not invoke the exemption in hopes that ignoring it will require the prosecution to prove lack of justification in its case in chief.

Another version of the research exemption that seems of little benefit to the researcher as potential defendant in an animal cruelty prosecution restricts the exemption to “research conducted in accordance with protocols approved by an animal care and use committee, as required under the federal Animal Welfare Act . . .” (Md Code, Crim. Law, §10-603(2)); or to “scientific research conducted by an institution in accordance with the federal animal welfare act and related regulations” (Ohio Rev. Code. § 959.131(D) (experiments on companion animals)). Such experiments are likely to be justified; both these exemptions are stated separately and hence will be treated as affirmative defenses, placing the burden of going forward with the evidence on the researcher defendant.

An even more damaging effect on the defendant arising out of exemptions worded in this manner is possible, one that cannot be avoided by the defendant’s eschewing the exemption. That is, a court may imply a legislative intent that any violation of the federal AWA and the regulations promulgated under it is per se a violation of the state cruelty statute so that justification under state law is not an issue at the trial. It is true that in *New Jersey S.P.C.A.* the court found that the exemption there did not eliminate justification as an issue, but that case is readily distinguishable. The exemption there was lost by an administrative failure -- to seek state board of health authorization -- that was not wrongful and caused no harm to an animal. Loss of an exemption by actual violation of an AWA standard promulgated to protect animals is a quite different matter.

² In Tennessee not only must the scientific test be “bona fide” but, for the exemption to apply, it must be performed in a “bona fide research laboratory.” Tenn. Code. §39-14-212(c)(8).

In Hawaii the exemption is for “activities carried on for scientific research governed by standards of accepted educational or medical practices.” Haw. Stat. § 711-1109(2). Would it not be reasonable to read into this a legislative judgment that if the prosecution proves deviation from such standards that establishes the case for lack of justification?

The same issue arises in New Mexico, where the exemption is for “research facilities licensed pursuant to” the federal AWA “except when knowingly operating outside provisions, governing the treatment of animals, of a research or maintenance protocol approved by the institutional animal care and use committee of the facility. N.M. Stat. § 30-28-1-I(6). This could also be construed to provide that a laboratory bit subject to federal law because it takes no federal money and gets its animals in interstate commerce only is acting without justification if its conduct with animals would violate the federal AWA.

SEVERAL OF THE RESEARCH EXEMPTIONS ARE UNCONSTITUTIONAL FOR DENYING EQUAL PROTECTION OF THE LAW OR FOR BEING VAGUE

State statutes that exempt research consistent with or violative of the AWA as well as violative of the state anti-cruelty statutes

It was concluded above that the Maryland and Ohio exemptions covering animal research conducted in compliance with the federal AWA and its implementing regulations probably provided no benefit to researchers because a court would without the exemption conclude the research justifiable. But there could be exceptional cases where a gap in the federal controls provides no federal remedy for what a state prosecutor considers unconscionable conduct -- perhaps conduct the state considers torture but federal regulators do not. Such a prosecution will raise the issue whether the defendant will lose the benefit of the exemption because it denies equal protection of the law to actors who, like researchers, come in frequent contact with animals and commit similar acts of cruelty but are prosecuted for it because they lack the benefit of an exemption. These would include researchers at laboratories not subject to the federal AWA whose experiments are not justified as that term is used under the state’s animal cruelty statute but also animal trainers, operators of rodeos, etc.

As no suspect class like race or gender is involved in the legislative line drawing that accords some actors immunity for inflicting cruelty on animals but not others will pass muster under the equal protection clause if supported by any rational basis the court can attribute to the legislators. If it would be very rare for an act of torture to be violative of state law but not the AWA, the state’s decision not to allocate its resources to policing the same conduct the federal government oversees should satisfy the any rational basis test.

But what of acts of torture that are violative of both the state’s felony animal cruelty statute and also the federal AWA? The state law which the AWA researcher escapes due to the exemption imposes a significant criminal sanction. . In Maryland, felony animal cruelty can be sanctioned by imprisonment for three years and a \$5,000 fine. Md. Code, Crim Law, § 10-603(2)(b). In other states

where the equal protection issue now under discussion can arise, criminal punishments for felony animal cruelty convictions are more severe. E.g., Conn. Stat. § 55-247(b) (five years in prison and \$5,000 fine). Under the AWA there are no criminal sanctions. Rather, a civil penalty of \$2,5000 can be imposed. 7 U.S.C. § 2149(b). Possibly, future federal funding for a researcher violating the AWA regulations or guidelines of the supervising institutional care committee might be withheld.

Moreover, under the federal AWA the Agriculture Department is required to inspect a laboratory only once a year. Reports are that inspections by the Department through APHIS are seldom made more frequently. The institutional care committee of the facility where the allegedly cruel researcher works is required to inspect only twice a year. Apparently, a witness to extreme cruelty during the conducting of research subject to federal authority AWA has no one working within the federal regulatory scheme that the witness can summon to come promptly to the laboratory to obtain evidence and make the federal equivalent to a state law arrest. Police charged with enforcing the state's criminal laws concerning cruelty to animals could be called in quickly.

Is it rational to turn down the explicit federal invitation in the AWA to apply state anti-cruelty laws that impose significant sanctions for serious violations when the federal sanction is so much less of a burden on the laboratory and the guilty researcher, and when severe and federal enforcement sporadic? The court in *Taub v. State* undoubtedly would have so held had the issue been raised there. My guess is that the appellate courts of other states would also hold that the state's ceding to the federal government exclusive control over the sanctioning for animal cruelty occurring in research governed by the AWA satisfies the any rational basis test. Oversight by one level of government is enough, especially when the cost of dual regulation is considered.

Another version of the research exemption the cedes to the federal government the policing of animal cruelty during research subject to the federal AWA is in effect in Hawaii and extends to "activities carried on for scientific research governed by standards of accepted educational or medical practices." Haw. Stat § 711-1109(2). The federal regulations and guidelines written to assure enforcement of the AWA surely are among "standards of accepted educational and medical practices."³ This is much broader than the "consistent with" exemption of Maryland because Hawaii cannot prosecute under its animal cruelty state (which covers torture – id, subd. (1)) even if the research was in gross violation of the AWA regulations but the federal government to no steps to impose sanctions. Such research involving cruelty was still "governed by" the AWA standards even though there was no enforcement in the particular case. As a result, some researchers get to commit cruelty without punishment but other actors in Hawaii not benefited by an exemption suffer criminal sanctions for the same actions.

³ This Hawaii exemption might extend to guidelines written at a university to regulate experiments on animals there and enforced via university "governance." That is, "governed by" does not necessarily refer to a governmental unit such as the U.S.A., the state, or a county or city within the state. Probably that issue is moot because every university in Hawaii gets some federal funds to support scientific research and thus is "governed by" AWA standards.

Although the question whether equal protection of the law is thus denied is much more difficult than it was in considering the narrower Maryland exemption, the Hawaii legislature could have concluded that federal non-enforcement of cruelty violations in situations where state prosecutors would have exercised prosecutorial discretion differently would be rare. Again, too, budgetary considerations support a legislative conclusion that one sovereign having power rather than two over see animal cruelty at research laboratories is enough, even if the federal sanctions are not as severe and federal government's frequency of sanctioning not as often as under a scheme of enforcement by the state. In sum, my guess is the Hawaii exemption will satisfy the any rational basis test.

State anti-cruelty statutes that exempt all medical research involving animals

The very broadest research exemptions are unconstitutional under the any rational basis test, and the courts will have void them as they are intended to apply in certain types of animal cruelty cases. One example is North Carolina's exemption for "lawful activities conducted for purposes of biomedical research or training." N.C.Gen. Stat. § 14-360(2). (See also Ala. Stat. § 13A-11-246 that allows felony torture of a dog or cat in the course of "pharmaceutical research or testing"). Since the North Carolina exemption applies expressly to felony malicious torture of animals, the "lawful" qualification cannot relate to animal cruelty but is intended to deny the exemption if the laboratory is acting unlawfully for other reasons, e.g, illegal alien employees were doing the experiment in which the cruelty occurred.

One California case not involving medical research but an exemption for destroying "dangerous to . . . life." *People v. Thomason*, 101 Cal. Rptr. 2d 247 (App. 2000). The defendants were convicted of torturing mice in the making of a "Crush video," but claimed the exemption by proving mice were a species that spread diseases such as the plague and hence were dangers to human life. The California court held that the maxim that a statute must not be construed to permit an absurd result required the exemption – the word "destroy" was not qualified in any way – not be literally interpreted. Rather it allowed only humane destruction of mice, not destruction by torture. The decisions legally unsound, and the unexpected, after-the-fact elimination of an exemption that on its face established that no crime had been committed denied the California defendants due process of the law.

The North Carolina exemption and others like it can be left in place by court decision as it applies to research governed by the federal AWA, as discussed above in connection with Hawaii's "governed by" exemption. But there will be research facilities not subject to the AA in North Carolina, and for its law to authorize felony torture of animals while denying others who interact frequently with animals the same exemption cannot be explained on any rational basis. As I have explained elsewhere, any defendant convicted with animal cruelty in North Carolina not covered by an exemption is entitled to have his conviction reversed because of unconstitutional discrimination against him or her. Reppy, *Broad Exemptions in Animal-Cruelty Statutes Unconstitutionally Deny Equal Protection of the Law*, 70 Law & Contemp. Prob. 255 (2007).

Exemptions that extend to facilities "registered" or "licensed" under the AWA

Colorado's exemption bars a prosecution for aggravated torture of animals done at "facilities licensed under the provisions of the federal Animal Welfare Act." Colo. Rev. Stat. § 18-9--201.5(4). Indiana's research exemption to its felony cruelty statute is similar but extends to a "facility registered" as opposed to licensed under the AWA. Ind. Code § 35-46-3-5(7). The wording of these exemptions makes analysis of their constitutionality, when attacked as denying equal protection of the law, quite different than that which led to the conclusion above that the Hawaii exemption for "research governed by" the AWA satisfied the any rational basis test. The reason is that "facility" -- key word in the Colorado and Indiana exemptions -- precludes prosecution for cruelty in many experiments done at the registered/licensed facility that are not subject to the AWA. The narrower exemption of Hawaii, extending only to research governed by the AWA does not have that effect.

More than 90 percent of research experiments on animals employ rats and mice, but the AWA does not apply to experiments on "birds, rats of the genus *Rattus*, and mice of the genus *Mus*, bred for use in research." 7 U.S.C. § 2132(g). No rational basis exists for subjecting researchers who torture mice at facilities under registered/licensed under the AWA to criminal prosecution but immunizing similar torture of mice at facilities that are so registered/licensed, since such registration or licensure does not involve the federal government in regulating experiments on mice. The judicial remedy will be similar to that laid out for North Carolina: the "facilities" exemption can stand so that it can be applied to research governed by the AWA but is otherwise unconstitutional. Any animal-cruelty defendant without an exemption freeing him or her to torture animals can get his or her conviction reversed.

SOME OF THE EXEMPTIONS PRESENT CONSTRUCTION PROBLEMS; ONE SEEMS SO UNCERTAIN AS TO BE HELD IN PART VOID FOR VAGUENESS

It was suggested above that the avoid-absurd-result maxim of construction cannot properly be used to the detriment of a defendant when the literal language of the exemption should preclude a conviction. A second candidate for application of such a rule is the Iowa exemption, to a statute barring torture of animals that is applicable only if the "research facility performs functions within the scope of accepted practices and disciplines." Iowa Code § 717B.3A(2)(k). Taken literally, if a facility employs 100 researchers and one of them adheres to accepted practices but the other 99 regularly torture animals, the facility is performing the required function, although not with respect to the great bulk of its research. It is truly absurd to make the criminal liability of X for torturing animals depend on whether co-researcher Y never does that. The absurd-result maxim would call for a construction to the effect that each researcher charged with cruelty is guilty unless the conduct he himself engaged in and which is alleged to be cruel torture was an "accepted practice." But research according to accepted practices is justifiable and not violative of the criminal prohibition, and hence the non-absurd construction results in the language having no legal effect contrary to the maxim of construction that if possible effect should be given to all the language of a statute. The result of lenity calls for the first-proposed interpretation that is absurd, which is likely to prevail. If the trial court

applied construction that in effect eliminates the exemption, an appellate court could reverse the judgment because the defendant could not have expected such an interpretation, while in the same opinion declare the exemption void for vagueness so it would not excuse acts of cruelty committed after the opinion became final. This would invite the state legislature to redraft it.

Courts seem oddly eager to find provisions in animal cruelty statutes violative of due process because of too vague language that the court thinks cannot be made certain by applying maxims of construction. See, e.g., *State v. Buford*, 331 P.2d 1110 (N.M. 1958) (“any animal” unconstitutionally vague as to whether gamecocks included); *Lock v. Falkenstine*, 380 P.2d 278 (Okla. Crim App. 1963) (“fight between animals” incurably vague due to uncertainty if birds were within the class of “animals” referred to). The exemption clause with language beset by ambiguity that perhaps cannot be resolved by applying maxims of construction such as the rule of lenity is that of Kansas, which limits the exemption to abuse of animals at “commonly recognized research facilities.” Kan. Stat. § 21-4310(b). Commonly recognized by whom, the public? Does “commonly” mean that more than 50% of the group that might recognize does recognize? Recognized for what qualities – good research? Any research? What pro-defendant construction could the rule of lenity call for? The defendant is well protected by judicial excision of the words “commonly recognized” because of incurable vagueness.

SURVEY OF STATE CRUELTY LAWS WITH RESEARCH EXEMPTIONS

The excerpts below from statutes defining the crime of animal cruelty focus on only those parts of the state statutes that deal with the most atrocious conduct by the defendant. With a few exceptions, these are felony cruelty provisions. All of the states whose anti-cruelty laws are reproduced below have animal cruelty provisions in addition to those quoted. Focus is on the felony provisions because they facilitate the arguments that the various research exemptions are supported by no rational basis and hence are unconstitutional.

ALABAMA

Section 13A-11-241 of the Alabama Statutes punishes as a felon “he or she [who] intentionally tortures any dog or cat” Section 13A-11-246 provides that the above section “shall not apply to . . . [a]cademic and research enterprises that use dogs or cats for medical or pharmaceutical research or testing.” Where the charge is torture, the exemption is invalid under the Equal Protection Clause because it grants to research scientists immunity from prosecution withheld from similarly situated persons – those who interact frequently with dogs and cats, such as professional pet sitters – based on no rational distinction.

ALASKA

Alaska Statutes section 11.61.140(a)(1) provides that one who “knowingly inflicts severe and prolonged physical pain or suffering on an animal” commits misdemeanor cruelty to animals, but subsection (c) provides that “It is a defense . . . that the conduct of the defendant (1) was part of scientific research governed by accepted standards.” The phrase “governed by” is not clear in its meaning. One possible interpretation of “governed by” in the exemption is that the defendant must have adhered to generally accepted research standards to qualify for the exemption. Or “governed by” could mean that Alaska will not prosecute for animal cruelty in research if some other body serves as an enforcer and had promulgated accepted standards to be followed. “Accepted standards” could, therefore, include the regulations concerning animal care at research laboratories promulgated under the federal AWA by the U.S. Dept. of Agriculture. The federal AWA does not apply to experiments on “birds, rats of the genus *Rattus*, and mice of the genus *mus*, bred for use in research.” 7 U.S.C. § 2132(g). Many experiments by AWA-licensed laboratories involve only mice or rats, but those are not “governed by” the federal regulations setting out standards of care.

CALIFORNIA

California Penal Code section 597 punishes as a felon “every person who maliciously and intentionally maims, mutilates, tortures . . . or kills an animal . . .” Section 599c provides that this prohibition, as well as many other California animal cruelty statutes, “shall not be construed as interfering with . . . properly conducted scientific experiments or investigations performed under authority of the faculty of a regularly incorporated medical college or university of this state.” The exemption seems to be of no benefit to persons charged with felony animal cruelty, because proof that the defendant acted maliciously would establish that the experiment was not “properly conducted.” The prosecutor cannot get a felony conviction merely by proof the experiment was intentionally undertaken.

COLORADO

Section 18-9-202 (1.5)(b) of the Colorado Revised Statutes provides that “A person commits aggravated [felony] cruelty to animals if he or she knowingly tortures, needlessly mutilates, or needlessly kills and animal.” Section 18-9-201.5(4) states that the above prohibition as well as other animal cruelty provisions “shall [not] affect facilities licensed under the provisions of the federal Animal Welfare Act of 1970 . . . , as amended.” The exemption is unconstitutional as a denial of equal protection of the law in extending the exemption to researchers who inflict gratuitous cruelty and birds, mice and rats (see ALASKA, *supra*) at facilities licensed under the federal AWA because the effect of doing so is to eliminate any applicable animal cruelty law with respect to such conduct, while leaving state or federal law to impose sanctions for similar cruelty occurring during other research involving animals.

CONNECTICUT

Section 53-247(b) of the federal statutes punishes as a felon “[a]ny person who maliciously and intentionally maims, mutilates, tortures, wounds or kills an animal The provisions of this subsection shall not apply to . . . any person . . . [w]hile performing medical research as an employee of, student in or person associated with any hospital, educational institution or laboratory.” This exemption violates the Equal Protection Clause (see ALABAMA, *supra*), because its benefits are withheld not only from researchers working at home but, in cases where the charge is torture, withheld from other persons who interact frequently with animals. There can be no rational basis for singling out a particular subgroup of people to be accorded a privilege to torture animals.

DELAWARE

Title 11, section 325(b), of the Delaware Statutes punishes one who “(4) Cruelly or unnecessarily kills or injures any animal” as a felon if “the person intentionally kills or causes serious injury” This provision is “inapplicable to . . . activities carried on for scientific research.” Comment: subsection (a)(1) defines “cruel” narrowly, so the exemption may not violate the Equal Protection Clause.

DISTRICT OF COLUMBIA

Section 22-1001(a) of the District of Columbia statutes punishes one who “knowingly . . . tortures, torments, . . . cruelly . . . mutilates, any animal, or . . . knowingly inflicts unnecessary cruelty upon the same” A violation is, under subsection (d), a felony if “serious bodily injury or death” results and the act was done “intent to commit seriously bodily injury or death to an animal, or . . . under circumstances manifesting extreme indifference to animal life” Section 22-1012(b) provides that the nothing in the above statute “shall be construed to prohibit or interfere with any properly conducted scientific experiments or investigations, which experiments shall be performed only under the authority of the faculty of some regularly incorporated medical college, university, or scientific society.” It is highly unlikely that a “properly conducted” experiment would ever be held to violate the District’s anti-cruelty statute, thus mooted the question whether equal protection of the law as guaranteed by the Fifth Amendment of the United States constitution is denied due to the very few actors accorded its benefit.

FLORIDA

Florida Statutes section 828.12(1) punishes as a misdemeanor “[a] person who unnecessarily . . . torments . . . any animal.” Section 828.02 defines “torment” as used above to include “every act, omission, or neglect whereby unnecessary or unjustifiable pain or suffering is caused, except when done in the interest of medical science.” Suffering imposed “in the interest of medical science”

probably involves justifiable conduct, making the exemption of little use to researchers. The prosecutor can avoid the exemption by charging not that the defendant researcher tormented an animal but rather that he or she unnecessarily mutilated or killed it. The exemption does not apply to felony animal cruelty under section 828.121(2).

GEORGIA

Georgia Code section 16-12-4-(c) punishes as a felon one who “knowingly and maliciously causes death or physical harm to an animal . . . by seriously disfiguring such animal.” Subsection (e) provides that the above prohibition “shall not be construed as prohibiting conduct which is otherwise permitted by the laws of this state or of the United States, including . . . Scientific, research, [and] medical . . . practices . . .” This exemption unconstitutionally denies equal protection of the law to persons who interact with animals but do not benefit from an exemption. See ALABAMA, *supra*.

HAWAII

Hawaii Statutes section 711-1109(1) punishes as a misdemeanor a “person [who] intentionally . . . tortures, cruelly beats or starves or . . . mutilates . . . or kills without need any animal” Subsection (2) provides that the above is “not applicable to . . . activities carried on for scientific research governed by standards of accepted educational or medical practices.” Concerning how the vague term “governed by” could be interpreted, see ALASKA, *supra*.

INDIANA

Indiana Code section 46-3-12(b)(2) punishes as a felon “the person [who] knowingly or intentionally tortures or mutilates a vertebrate animal” Section 35-46-3-5 provides that the above statute “does not apply to . . . (7) A research facility registered with the United States Department of Agriculture under the federal Animal Welfare Act” The term “registered with” makes the exemption unconstitutional because researchers at AWA registered facilities who inflict gratuitous cruelty on mice and rats are not -- for any rational reason -- By Indiana law made subject to any anti-cruelty law, state or federal. See COLORADO, *supra*.

IOWA

Iowa Code section 717B.3A(1) provides: “A person is guilty of animal torture . . . if the person inflicts upon the animal severe physical pain with a depraved or sadistic intent to cause prolonged suffering or death.” The first offense is an aggravated misdemeanor, the second a felony. Subsection (2) states that the above prohibition “shall not apply to . . . (k) [a]n [educational] institution . . . or a

research facility . . . provided that the institution or research facility performs functions within the scope of accepted practices and disciplines associated with the institution or research facility.” Literally, under the exemption if one researcher at a laboratory follows “accepted practices” all the rest of the researchers may sadistically torture animals. Such a literal interpretation leads to such an absurd result that it might be rejected in favor of an interpretation that the exemption itself applies only in situations where “accepted practices” have been followed. But, since sadistic torture is never an accepted practice of a research facility, that interpretation would nullify the exemption and for that reason could well be rejected. The rule of lenity supports adoption of the literal interpretation, which makes the exemption unconstitutional as a denial of equal protection to persons who interact with animals but are not benefitted by an exemption that allows them to torture animals.

KANSAS

Section 21-4310 of the Kansas Statutes provides that “maliciously killing, injuring, maiming, torturing, burning or mutilating any animal” is a felony. Subsection (c)(2) defines “maliciously” to mean having a “state of mind characterized by actual evil-mindedness or specific intent to do a harmful act without a reasonable justification or excuse.” Subsection (b) provides that the above prohibition “shall not apply to . . . (2) bona fide experiments carried on by commonly recognized research facilities.” The exemption is unconstitutional under the Equal Protection Clause. See ALABAMA, *supra*. A good argument can be made that the “commonly recognized” qualification renders the exemption void for vagueness as well. Note that most likely an experiment can be “bona fide” under the exemption clause even though the researcher acts maliciously in the sense the researcher knows his or her acts will cause death or mutilation of an animal, but if the researcher were malicious in the sense of being evil minded (e.g., seeking personal thrills from watching animals suffer), the experiment surely would not be bona fide and the exemption not applicable.

KENTUCKY

Kentucky Revised Statutes section 525.130(1) punishes as a misdemeanor one who “intentionally or wantonly” engages in (a) “mutilation, beating, [or] torturing any animal other than a dog or cat . . .” Subsection (2) states: “Nothing in this section shall apply to the killing of animals . . . (f)[f]or bona fide animal research activities of institutions of higher education; or a business entity registered with the United States Department of Agriculture under the Animal Welfare Act or subject to other federal laws governing animal research.” Section 525.135 is similar with respect to dogs and cats. Note that the exemption applies only to killing, and not to mutilating or torturing animals. Even though an animal might die after torture during a research experiment, the prosecutor could plead only the act of torture and, apparently, thereby eliminate applicability of the exemption. In section 525.135 the exemption extends to injuring as well as killing dogs and cats. Because mere registration under the federal AWA triggers the exemption, it is unconstitutional. See COLORADO, *supra*. With respect to issues raised by the “bona fide” qualification in the exemption, see KANSAS, *supra*.

LOUISIANA

Section 14:102.1 - B(1) of the Louisiana Revised Statutes states: "Any person who intentionally or with criminal negligence tortures, maims, or mutilates any living animal . . . shall be guilty of aggravated [felony] cruelty to animals." Subsection C provides: "This section shall not apply to . . . [a]ctivities carried on for scientific or medical research governed by accepted standards."

As to what "governed by" in the exemption might mean, see ALASKA, *supra*.

MAINE

Maine Revised Statutes, title. 17, section 1031-1-B, provides that a person is guilty of aggravated cruelty to animals and liable for a fine of up to \$10,000 if "that person, in a manner manifesting a depraved indifference to animal life or suffering, intentionally, knowingly or recklessly: A. Causes extreme physical pain to an animal; B. Causes the death of an animal; or C. Physically tortures an animal." Section 1031-2 provides "It is an affirmative defense . . . that . . . A. The defendant's conduct . . . was part of scientific research governed by accepted standards" Concerning the ambiguity inherent in "governed by," see ALASKA, *supra*.

MARYLAND

Maryland Code, Criminal Law, section 10-606(a)(1) classifies as felons persons who "intentionally mutilate, torture, cruelly beat, or cruelly kill an animal." Section 10-603(2) provides that the foregoing does not apply to "research conducted in accordance with protocols approved by an animal care and use committee, as required under the federal Animal Welfare Act or the federal Health Research Extension Act." This exemption seldom will be of any benefit to researchers, as the institution's animal care and use committee is likely to include in the protocols it applies to researchers a requirement that the researcher adhere to all regulations concerning care of animals promulgated by the U.S. department of Agriculture. A violation of the Maryland felony cruelty statute is likely to also be a violation of one of those regulations or of regulations the institutional care committee made for research at its facility.

MICHIGAN

Michigan Compiled Laws section 750.50b(2) punishes as a felon "[a] person who willfully, maliciously and without just cause or excuse kills, tortures, mutilates, maims, or disfigures an animal" Subsection (9) states: "This section does not prohibit the lawful killing or use of an animal for scientific research pursuant to any of the following [citing statutes dealing with use of dogs and cats in research and research by the State Public Health Department]". Since the exemption is intended to apply to felony cruelty that involves malice, "lawful" must refer to matters other than animal cruelty, such as the operation of a research laboratory in violation of zoning laws. See Reppy, Broad

Exemptions in Animal-Cruelty Statutes Unconstitutionally Deny Equal Protection of the Law, 70 L. & Contemp. Prob. 255, 263-67 (2007). Query if reference to “use” in the exemption is intended to mean use that involves “torture[], mutilat[ion], [or] maim[ing]”. Under the rule of lenity it could. The exemption violates the equal protection clause because it extends to cruelty to dogs and cats in research at all facilities and cruelty in research conducted by the health department but not to cruelty done by other actors denied the benefit of the exemption for no rational reason.

MISSOURI

Missouri Statutes section 578.012(2) punishes as a felon one who “[p]urposely or intentionally causes injury or suffering to an animal . . . [as] the result of torture or mutilation, or both, consciously inflicted while the animal was alive.” Section 578.007 provides that the above “shall not apply to . . . (2) [b]ona fide scientific experiments.” What might constitute an experiment that was not bona fide? A narrow interpretation is likely, covering perhaps only an experiment undertaken not to gain scientific knowledge but to provide a cover for sadistic torture of animals. A bona fide experiment surely would not involve torture but could involve mutilation. See also discussion of “bona fide” under KANSAS, *supra*.

MONTANA

Montana Statutes section 45-8-211 (1) punishes as a misdemeanor one who, “without justification, . . . knowingly or negligently subjects an animal to mistreatment . . . by (a) . . . torturing, injuring, or killing the animal.” Subsection (4) says this “does not prohibit . . . (f) lawful scientific or agricultural research or teaching that involves the use of animals.” The exemption does not apply to felony aggravated cruelty to animals. Mont. Stat. § 45-8-217. If “use” in the exemption refers back to the prohibited mistreatment, the exemption as applied to research not governed by the federal AWA is unconstitutional as a denial of equal protection of the law to persons who interact with animals but are not exempted. With respect to what “lawful” means, see MICHIGAN, *supra*.

NEBRASKA

Section 28-1009(b) of the Nebraska Statutes provides: “A person who cruelly mistreats an animal is guilty of a Class IV felony if such cruel mistreatment involves the knowing and intentional torture, repeated beating, or mutilation of the animal.” Section 28-1013 states that the above “shall not apply to . . . (3) research activity carried on by any research facility currently meeting the standards of the federal Animal Welfare Act . . . as such act existed on January 1, 2003.” What does “currently” refer to? The time of trial? The time of the cruelty offense? If the latter, the exemption would seldom apply, as most instances of cruelty would also violate the U.S. Department of Agriculture’s regulations for care of animals in research laboratories. The rule of lenity supports the interpretation

that if, after a violation, the facility takes corrective actions so that it is free violations at the time of trial, the action should be dismissed as a reward for the improvement made.

NEW JERSEY

New Jersey Statutes section 4:22-17(b)(1) and (2) makes it a crime punishable by incarceration for up to 18 months to “purposely, knowingly, or recklessly . . . [t]orment, torture, maim, . . . cruelly beat, or needlessly mutilate a living animal.” Subsection (c) provides greater punishment if the animal dies due to violation of the above prohibition. Section 4:22-16(a) provides that the above language does not prohibit “[p]roperly conducted scientific experiments performed under the authority of the [New Jersey] Department of Health or the United States Department of Agriculture. Those departments may authorize the conduct of such experiments or investigations by agricultural stations and schools maintained by the State or federal government or by medical societies, universities, colleges and institutions. . . .” The qualifier “properly conducted” seems to render the exemption useless, as a properly conducted experiment would be justifiable. See New Jersey SPCA, *supra*.

NEW MEXICO

New Mexico Statutes section 30-28-1-E provides: “Extreme cruelty to animals consists of a person (1) intentionally or maliciously torturing, mutilating, injuring or poisoning an animal or (2) maliciously killing an animal.” A violation is a felony. Subsection I(6) says the above does not apply to “research facilities licensed pursuant to the provisions of 7 U.S.C. Section 2136, except when knowingly operating outside provisions, governing the treatment of animals, of a research or maintenance protocol approved by the institutional animal care and use committee of the facility” The term “licensed” renders the exemption unconstitutional for reasons discussed under COLORADO, *supra*.

NEW YORK

New York Agriculture and Markets Law section 353-a-1, entitled Aggravated Cruelty to Animals, punishes as a felon one who “intentionally kills or intentionally causes serious physical injury to a companion animal . . . [by] conduct which: (i) is intended to cause extreme physical pain; or (ii) is done or carried out in an especially depraved or sadistic manner.” Subsection 3 provides the above does not apply to “any properly conducted scientific tests, experiments or investigations involving the use of animals, performed or conducted in laboratories or institutions which are approved for such purposes by the commissioner of health” This exemption is narrow, as most research animals are not companion animals. Moreover, no “properly conducted” experiment would involve a researcher acting in a depraved or sadistic manner. See NEW JERSEY, *supra*. The same exemption applies to misdemeanor cruelty under section 353, which is not limited to companion animals.

NORTH CAROLINA

North Carolina General Statutes section 14-360(c) classifies as felons persons who “maliciously torture, mutilate, maim, cruelly beat, disfigure, poison, or kill . . . any animal . . .” and defines “maliciously” as “an act committed intentionally and with malice or bad motive.” Section 14-360 provides the foregoing “shall not apply to . . . (2) [l]awful activities conducted for purposes of biomedical research or training . . .” Comment: As to the meaning of “lawful” in the exemption, see MICHIGAN, *supra*, and the article cited there, which specifically deals with the North Carolina exemptions. Because the statute immunizes from prosecution researchers acting with “bad motive” who torture animals but provides no similar benefit to other actors who interact with animals, such as horse trainers, the statute is unconstitutional under the Equal Protection Clause.

OHIO

Ohio Rev. Code § 959.131(B) makes it a first degree misdemeanor (see § 959.99(E)(1)) to “knowingly torture, torment, needlessly mutilate or maim, cruelly beat, poison, or needlessly kill . . . a companion animal.” Subsection (D) provides that the above does “not apply to . . . (1) [a] companion animal used in scientific research conducted by an institution in accordance with the federal animal welfare act and related regulations.” If torture or tormenting an animal in a scientific experiment is not a crime under this statute if the experiment was justifiable, (e.g., it was bona fide), even though the legislature declined to modify “torture” and “torment” with the term “needlessly,” the exemption seems of no benefit to researchers, as an experiment that adheres to the federal AWA regulations is going to be held to be a justifiable use of the animal.

OREGON

Oregon Revised Statutes section 167-320 provides for prosecution of one who “intentionally, knowingly or recklessly: (a) Causes serious injury to an animal; or (b) Cruelly causes the death of an animal.” Violation is a felony if done in the immediate presence of a minor, otherwise a class A misdemeanor. Oregon’s exemption statute, § 167.335, says it applies to animal cruelty crimes laid out in sections “167.315 to 167.333,” which include the above prohibition. One exemption is for “(9) Lawful scientific or agricultural research or teaching that involves the use of animals.” But the exemption does not apply if “gross negligence can be shown.” Since a conviction under section 167-320 demands proof of a mens rea involving more serious wrongful intent (“intentionally, knowingly or recklessly”), courts surely will hold the exemption does not apply at all to section 167-320.

SOUTH DAKOTA

South Dakota Laws section 40-1-27 provides that “No person owning or responsible for the care of an animal may inhumanely treat such animal.” Violation is a misdemeanor. Section 40-1-2.4 defines

inhumane treatment as including any “act . . . of torture, cruelty, neglect . . . mutilation, or inhumane slaughter.” Section 40-1-16 says that the above prohibition does not apply to “any properly conducted scientific experiments or investigations, which experiments or investigations are performed by personnel following guidelines established by the National Institute of Health and the United States Department of Agriculture.” If, as seems likely, the South Dakota courts would recognize justification as at least an affirmative defense to a charge of inhumane treatment, the exemption provides no benefit to a defendant charged under section 40-1-27.

TENNESSEE

Tennessee Code section 39-14-212(a) punishes as a felon a “person who commits aggravated cruelty to animals when, . . . with no justifiable purpose, the person intentionally kills or intentionally causes serious physical injury to a companion animal.” “Aggravated cruelty” means conduct which is done or carried out in a depraved and sadistic manner and which tortures or maims an animal, including the failure to provide food and water to a companion animal resulting in a substantial risk of death or death. *Id.*, subsec. (b)(1). Subsection (c)(8) says the above does not prohibit “[p]erforming or conducting bona fide scientific tests, experiments or investigations within or for a bona fide research laboratory, facility or institution.” No bona fide experiment is conducted in a “depraved and sadistic” manner, hence the exemption is of no benefit to researchers. The statute prohibiting misdemeanor torture and maiming is not restricted to companion animals and exempts “bona fide experimentation for scientific research.” As to what “bona fide” means when qualifying “experimentation,” see KANSAS, *supra*. A bona fide experiment should not involve torture but may involve maiming. Surely, however, an experiment found to be bona fide will also will be found to be justifiable, and lack of justification is an element of the crime the prosecutor must prove. Thus the exemption is also of no benefit to researchers charged with misdemeanor cruelty.

TEXAS

Texas Penal Code section 42.092(b) punishes as a misdemeanor one who “intentionally, knowingly, or recklessly . . . tortures an animal or in a cruel manner kills or causes serious bodily injury to an animal.” Livestock are excluded from this section. Subsection (d) provides: “It is a defense . . . that . . . (2) the actor was engaged in bona fide experimentation for scientific research.” The same defense applies to the statute creating the misdemeanor of torturing livestock. Tex. Pen. Code § 42.09(e). As to what “bona fide” may mean, see KANSAS and TENNESSEE, *supra*.

UTAH

Utah Code section 76-9-301(3)(a) authorizes a misdemeanor conviction of one who “tortures an animal.” Subsection (5) provides: “It is a defense . . . that the conduct of the actor towards the animal was . . . (b) directly related to bona fide experimentation for scientific research, provided that if the

animal is to be destroyed, the manner employed will not be unnecessarily cruel unless directly necessary to the veterinary purpose or scientific research involved.” As to the meaning of “bona fide,” See KANSAS and TENNESSEE, *supra*. A reader wonders how a mode of death that is “necessary” to the success of the experiment can be “unnecessarily” cruel.

VERMONT

Section 352a of title 13 of the Vermont Statutes punishes as a felon one who “(1) kills an animal by intentionally causing the animal undue pain or suffering; or (2) intentionally, maliciously, and without just cause tortures, mutilates, or cruelly beats an animal.” Section 351b says the above “shall not apply to . . . (2) scientific research governed by accepted procedural standards subject to review by an institutional care and use committee.” This refers to the committee at the research institution required by the federal AWA. 7 U.S.C. § 2143(b). Vermont’s section 352b(b)(1) recasts the apparent exemption just quoted as “an affirmative defense.” As to what “governed by” may mean, see ALASKA, *supra*. Query if a standard imposed on researchers by the committee that requires that measures be taken to reduce pain and suffering of an animal during experiments is a “procedural” standard as that term is used in the language of the affirmative defense.

VIRGINIA

Section 3.1-796.122-H of the Virginia Statutes punishes as a felon “[a]ny person who (i) tortures, willfully inflicts inhumane injury or pain not connected with bona fide scientific or medical experimentation or cruelly and unnecessarily beats, maims, or mutilates any dog or cat that is a companion animal . . . and (ii) as a direct result causes the death of such dog or cat” Based on the legislature’s choice of grammar, the exemption for scientific research cannot apply to the maiming or mutilating of a dog or cat occurring during a scientific experiment, although a common law defense of justification might be recognized for such acts. As to what “bona fide” may mean in the exemption, see KANSAS and TENNESSEE, *supra*. Query what “connected with” an experiment means. Suppose a puppy wanders into a laboratory while a researcher is doing an experiment and distracts and annoys the researcher by jumping on him. The researcher in response brutally and repeatedly kicks the puppy, causing inhumane pain. Can the researcher avoid conviction because his acts were “connected with” the experiment? The rule of lenity would suggest that result. But such a construction should render the exemption unconstitutional for lack of any rational basis for exempting from prosecution a researcher for causing such pain to a dog who annoys the researcher while permitting conviction for the same conduct by other actors -- such as a dog groomer or trainer -- who become annoyed with a dog while performing the defendant’s trade. To save the statute from being invalidated for denying equal protection of the law, “connected with” may be construed to mean “an integral part of.”

WASHINGTON

Section 15.52.205(1) of the Revised Code of Washington classifies as a felon one who “intentionally (a) inflicts substantial pain on, (b) causes physical injury to, or (c) kills an animal by means causing undue suffering” Section 16.52.180 provides that nothing in the above statute “shall be deemed to interfere with . . . any properly conducted scientific experiments or investigations, which experiments or investigations shall be performed only under the authority of the faculty of some regularly incorporated college or university of the state of Washington or a research facility registered with the United States department of agriculture and regulated by 7 U.S.C. Sec. 2131 et seq.” If in Washington, a justifiable act involving an animal is not a violation of the anti-cruelty statute, the exemption appears to be of no benefit to researchers, since a justifiable experiment causing pain or injury would not be a violation and any “properly conducted” experiment is likely to be held to be justifiable.

WEST VIRGINIA

West Virginia Code section 61-8-19(b) provides that “[i]f any person intentionally tortures, or mutilates or maliciously kills an animal . . . he or she is guilty of a felony.” Subsection (f) provides that the above prohibition does “not apply to . . . activities regulated under and in conformity with the provisions of 7 U.S.C. § 2131 et seq and the regulations promulgated thereunder”

WISCONSIN

Wisconsin Statutes section 951.02 provides: “No person may treat any animal . . . in a cruel manner. This section does not prohibit bona fide experiments carried on for scientific research” Section 951.01(2) defines “cruel” as “causing unnecessary and excessive pain or suffering or unjustifiable injury or death.” The crime is a felony if the defendant “intentionally violates § 951.02, resulting in the mutilation or disfigurement or death of an animal.” *Id.*, § 951.18(1). The exemption seems to be of no benefit to researchers, since a bona fide experiment would not be unnecessary as that term is used in animal cruelty cases and would be justifiable.